

HEARING DECISION

Student's Name:

Parent's Name:

Parent's Representative: Stephen Walker
Attorney at Law
23245 Fairmount Blvd.
Beachwood, Ohio 44122
Phone: (216) 360-9200

Local Education Agency: Appleton City R-II School
408 West 4th
Appleton City, Missouri 64724
Phone: (816) 476-2161

Agency Representatives: Teri B. Goldman
Mickes, Tueth, Keeney, Cooper, Mohan
& Jackstadt, P.C. Attorney at Law
425 South Woods Mill Road, Suite 300
St. Louis, MO 63017
Phone: (636) 237-2600

Hearing Dates: September 20 to September 22, 2000

Date of Decision: October 30, 2000

Hearing Panel: Dr. Terry Allee
Patrick O. Boyle, Chairman
and
Rand Hodgson

ISSUES AND PURPOSE OF THE HEARING

Parent requested a due process hearing on August 27, 1997 and stated that the student had not been evaluated, no IEP prepared and no educational placement made. Parent's proposed resolution was reimbursement for school fees and attorney's fee. This request was supplemented by a Section 300.507(c) disclosure statement submitted by the parent on November 18, 1997. This disclosure statement sets forth in detail allegations that the School District failed to evaluate the student and offer a free and appropriate public education. Reimbursement was sought for the cost of tuition and related costs associated with the student's unilateral placement at St. Joseph's Institute for the Deaf.

School District filed a motion to dismiss the due process hearing on November 24, 1997 and raised two points in support of its motion. The first point alleged that the parent refused to consent to an initial evaluation of the three year old student and, therefore, the District had no obligation to provide special education and related services at that time. Point two was that the Missouri Constitution prohibits the expenditure of public funds for parochial school

The three-member due process panel requested evidence relating to the District's Motion to Dismiss prior to consideration of the case in chief. At issue was whether or not parent knowingly refused to consent to an initial evaluation of her three-year-old student.

Based upon evidence presented at the first hearing, the panel concluded that parent had refused to consent to evaluation. This decision of the panel was reversed by the U. District Court for the Western District of Missouri with its memorandum and

order in Case Number 98-0198-CV-S-6 dated January 21, 1999. On remand a subsequent three member panel agreed to determine whether or not a free appropriate public education had been offered to the student from age three to the present time and, if not, what reasonable reimbursement should be made to the parent for a private placement at St. Joseph's Institute for the Deaf.

On July 14, 1999 the panel entered its hearing decision that a free and appropriate public education had not been offered to the student under an Individualized Education Program (IEP) as drafted on April 27, 1998.

A further decision was made that the Constitution of the State of Missouri prohibits reimbursement for private placements in parochial schools such as St. Joseph's Institute for the Deaf.

This decision of the hearing panel was remanded by order of the U. District Court, Western District of Missouri in consolidated cases numbered; 98-0198-CV-W-6; 99-0721-CV-W-4-6; and 99-0775-CV-W-5-6 on March 20, 2000. The court stated that the initial remand ordered the hearing panel to determine "whether, apart from the legal questions, the services offered the parents by the School District constituted a free appropriate public education, and if not, whether the services received at St. Joseph's complied with the IDEA so that reimbursement would be appropriate". Decision is rendered herewith under the second remand order.

TIME LINE INFORMATION

This matter was remanded to the panel which rendered the decision dated July 14, 1999 by court order dated March 20, 2000. On April 5, 2000 the School District requested an extension of time for decision for the purpose of obtaining the administrative record from the prior hearing. On May 8, 2000 the panel chair entered an order extending the time for decision to July 1, 2000. Missouri's

Department of Elementary and Secondary Education was unable to obtain the official court record of the administrative hearing from the court clerk and on June 29, 2000 the panel chair entered an order extending the time for decision herein to October 30, 2000. The prior record was reconstituted by agreement of the parties and, additional evidence was presented by agreement of the parties at a hearing held from September 20, 2000 to September 22, 2000. Decision is rendered herewith on October 30, 2000.

FINDINGS OF FACT

1. Student was born on . (2000 Tr.)
2. Student is hearing impaired and received a cochlear implant on or about June 13, 1996. (Ex. R-102 at 391)
3. On or about October 4, 1996 student's parents unilaterally and voluntarily placed student at St. Joseph's Institute for the Deaf, a parochial school located in Kansas City. (1997 Tr. 272)
4. At age on or about December 30, 1996, student as a hearing impaired child was potentially eligible for Early Childhood Special Education ("ECSE") services offered by the Local Educational Agency (LEA) through the Butler School District Cooperative ("the Coop") (Ex. R-1)
5. The LEA completed screening of the student on December 3, 1996.
6. Student was referred to the Coop for an ECSE evaluation on or about December 16, 1997. (1997 Tr. 36-37; Ex. R-3, R-4)
7. On or about January 21, 1997 the Coop, LEA and student's parent met to discuss parent's consent for student's initial evaluation. (1997 Tr. 44, 57; Ex. R-41)
8. On or about January 21, 1997 parent signed a notice of action form on a line reading:

"I do not give my consent for this initial evaluation/placement."

9. On January 19, 1998 a prior three member due process panel held that parent's signature denying consent to evaluation /placement prevented a coop evaluation of the student to determine eligibility for ECSE and, therefore, the LEA had no obligation to offer the three year old student a free appropriate public education (FAPE) at that time.
10. On January 21, 1999 the U. District Court for the Western District of Missouri in Case Number 98-0198-CV-S-6 reversed the three member due process panel's determination of January 19, 1998 and remanded this proceeding for determination as to whether, apart from legal questions, the services offered by the LEA to the student constituted FAPE, and if not, whether the services received at St. Joseph's complied with the IDEA so that reimbursement would be appropriate.

11. This three member due process panel reviewed an Individualized Education Program ("IEP") developed for the student on April 27, 1998 and entered a decision dated July 14, 1999 holding that the IEP did not offer FAPE to the student but, that no reimbursement of tuition could be made for placement in a parochial school under the terms of the Missouri State Constitution.
12. On March 20, 2000 the U. District Court of the Western District of Missouri in cases numbered: 98-0198-CV-W-6; 99-0721-CV-W-4-6; and 99-0775-CV-W-5-6 remanded the proceedings to this three member panel for action consistent with the court order of January 21, 1999.
13. Exhibits P58 and R78 contain the IEP which was developed by an IEP team at the meeting of April 27, 1998 and mailed to the parents on May 21, 1998.
14. The IEP of April 27, 1998 fails to set forth the special education services and related services proposed to be offered to the student. (Ex. R-78 at p.258 and Ex. p.58)
15. Parent requested a continuation on the notice of action form submitted with the IEP of April 27, 1998 (Ex. R79 and P57)
16. The IEP of April 27, 1998 as drafted failed to offer FAPE to the student.
17. Student has been unilaterally and voluntarily placed by parents at St. Joseph's Institute for the Deaf, a parochial institution in Overland Park, Kansa
18. St. Joseph's Institute for the Deaf was approved for the school year 2000 by the State of Missouri as a school for private placement.
19. St. Joseph's Institute for the Deaf was required to make changes in its facilities relating to religious symbols and in its students educational records relating to IEP and documentation of student progress in order to obtain approval from the State of Missouri. (2000 Tr.)
20. LEA stipulated at the prior hearing that the student received educational benefit at St. Joseph's Institute for the Deaf but, the LEA offered evidence on remand that student's test scores did not show academic progress while attending St. Joseph's Institute for the Deaf.

DECISION AND RATIONALE

The IEP dated April 27, 1998 did not contain adequate provisions as set forth under Part II Section V(10) of the Missouri State Plan. A free and appropriate public education has not been offered student under the IEP as drafted. Parent is entitled to reasonable compensation for an appropriate private placement.

Based upon student's age and needs in view of the lack of a written offer of FAPE from the LEA, the private unilateral placement at St. Joseph's Institute for the Deaf was appropriate if the provisions of the Missouri Constitution concerning the use of state money at parochial schools are not relevant. The panel is unable

to determine what amount of reimbursement would be proper based upon the evidence submitted.

APPEAL PROCEDURE

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Supporting Decision Panel Members Opposing Decision

Patrick O. Boyle Dr. Terry D. Allee

Rand Hodgson

October 25, 2000

DESSENTING OPINION STATEMENT

Prepared by: Dr. Terry Allee

RE: /APPLETON CITY RII SCHOOL DISTRICT

REMAND DUE PROCESS HEARING SEPTEMBER

20/21, 2000

On January 21, 1999, the case was remanded to the administrative panel for the panel to determine "Whether apart from the legal questions, the services offered the s by the school district constituted a Free Appropriate Public Education (FAPE) and if not whether the services received at St. Joseph's complied with the IDEA and that reimbursement would be appropriate." A remand hearing was conducted on September 20-21, 2000.

With respect to the first part of the remand, the Hearing Panel's decision dated July, 1999 stated "The district's IEP dated April 27, 1998 did not offer FAPE." The district's proposed IEP of April 27, 1998 was in effect under the old law and was prior to the new IEP requirements which

went into effect July 1, 1998. This IEP did not contain a statement of the specific special education and related services to be provided to , including the type of service and amount of time to be committed to each of the service

The district's April 27, 1998 IEP did however, contain all other requirements of the pre-amended IDEA, including, a statement of present level of performance, annual goals and short term objectives, appropriate objective criteria, evaluation procedures and schedules for determining whether the objectives were achieved, documentation that extended school year services (ESY) were considered, and consideration of the least restrictive environment and placement for . Although the panel concluded that FAPE was not offered through the district IEP, the procedural errors previously described did not result in educational harm to and should not be considered a violation of the IDEA. The district's proposed IEP satisfied the IDEA substantive requirement

With respect to the second part of the remand, the panel is to determine whether the services received at St. Joseph's complied with the IDEA as that reimbursement would be appropriate. I do not believe St.

Joseph's program complied with the IDEA for the following reasons:

1. 's written program (IEP) developed by St. Joseph's during the 1996-97, 1997-98, and 1998-99 school years only contained goals and objective Their written document did not contain appropriate objective criteria and evaluation procedures, a schedule for determining whether the short-term objectives were being achieved. The written program did not contain a statement of 's present level of

performance, the specific special education and related services to be provided to , the type of services and the amount of time of each service, the extent to which participates with non-disabled peer Further, it did not contain the projected dates for initiation of services and anticipated duration of the services, documentation that ESY was considered, a description on the IEP which assures equal opportunity for participation in non-academic activities

2. The St. Joseph's written program (IEP) did not consider the Least Restrictive Environment (LRE) mandate of the IDEA which states that to the maximum extent appropriate students with disabilities, including students in private institutions are educated with students who do not have disabilities The written program did not describe how the nature and severity of 's disability required him to be placed in such a restrictive environment. It did not consider the use of supplementary aids and services that could allow to be served in a less segregated setting.

3. St. Joseph's written document (IEP) did not describe how 's recommended placement was determined, nor did the St. Joseph's staff consider that placements are to be as close to home as possible unless the IEP requires some other arrangement The St. Joseph program is approximately 100 miles from 's home. The IDEA requires that the placement decision for a student with a disability should be educated with peers who do not have a disability unless the needs of

the student with a disability requires other arrangement The evidence and testimony presented to the panel did not justify placement of in such a restrictive setting. The St. Joseph's written program did not provide any justification for such a restrictive placement.

4. St. Joseph's annual evaluations, progress summaries and program goals and objectives did not show clear evidence that made progress or benefited educationally.

- The results of the Preschool Language Scale -3 (PLS-3) administered in April 1997, September 98, February 99 and October 99 indicated little progress or regression of language skills when auditory comprehension, expressive comprehension and total language standard scores, percentiles and age equivalents are compared. (refer to attachment #1) The results of the St. Joseph September 98 administration was determined to be invalid for both auditory comprehension and the total score.

- The results of Peabody Picture Vocabulary Test (PPVT) reflect very minimal or inconsistent progress when comparing standard scores and percentile

- The PLS and the PPVT are standardized, norm-referenced tests that are considered a valid and reliable language measure for children ages birth through six (6) years of age.

There is a certain amount of error reflected in the score a child earns on any test. If a test were perfectly reliable, a child would always earn the same score if given the test repeatedly. This score is a hypothetical score, called the "true" score. Since no test is perfectly reliable, the

"true" score is expected to lie within a range of scores that reflects the test error.

A statistic that gives you an estimate of the "error" present in a test is the standard error of measurement (SEM). The SEM is the amount of which the obtained score may differ from the "true" score because of the errors of measurement. SEM is used to calculate the confidence bands for the standard scores a child earned on tests such as the PLS-3 or the PPVT.

A child's score on a norm-referenced test is an estimate of his or her ability level or "true" score. Because the obtained score is an estimate, it is expected to vary from one sample of tasks to another and from one testing occasion to another. Because there is a margin for error in the results obtained on a test, you should never consider the score obtained on a standardized test as a perfectly precise measure of ability.

It is more appropriate to think of a child's "true" score as being within a range of score. This range of scores is known as a confidence band. You can establish the boundaries of this band to reflect different levels of confidence in the child's score.

Even if consideration is given to the SEM, which is present in all standardized tests, did not make progress based on the results of these test. Other standardized tests were administered, but they were not re-administered and therefore, comparisons cannot be made. The SEM for most standardized test is generally 3-7 points depending on the test, subtest and age of the student.

- Some professionals advocate the use of curriculum based, criterion referenced and informal assessment. Part of St. Joseph's written documentation included goals and objectives updates and program

summaries These evaluative procedures are important but are very subjective.

Analysis of the goals and objectives document indicate only mastered 11 of the 88 objectives from October 96 - April 1999. According to the goals and objectives document developed in January 99 and April 99, did not master any of the objectives for the 98-99 school year. Finally, St. Joseph did not have documentation of the evaluation results for any of its goals and objective (See attachment #2 and #3)

When comparing the district's proposed IEP of April 27, 1998 with St. Joseph's written document, the district's IEP contained all of the IEP required components except a statement of the special education and related services to be provided. The St. Joseph's written document only contained goals and objectives and they were not measurable, nor did they describe the evaluation procedure to be used to determine whether or not progress was being made.

In summary, reimbursement is inappropriate because St. Joseph's written documents did not comply with the IDEA. The results of the annual evaluations, goals and objectives and progress summaries did not show clear evidence of educational progress. In addition, evidence was not presented to document mastery of the goals and objectives from October 1996 - April 1999.

Attachment #1

ANNUAL EVALUATIONS

April 97 Developmental History – repeated from earlier report

April 97 Ling Sound Test * Detect all 6 sounds at 12 ft.

* Beginning to respond to his name

Sept. 98 * Able to identify Ling 6 sounds from 9 ft.

Phonetic Level Speech and Non Verbal Segmental Evaluation

April 97 (Based on Ling)

Able to produce vowel "a" (hat) "i" (bee)?? "u" (shoe), produce "L"
is isolation

Sept. 98 * consistent "y" sound

Feb. 99 *inconsistent "y" sound

*unable to produce b, stop, d, g, k, l, t

Peabody Picture Vocabulary Test (PPVT)

April 97 * SS 63 Staine 1 AE 2-0

Feb. 99 * SS 60 Staine 1 AE 3-0

Oct. 99 *SS 66 Staine 1 AE 3-4

Preschool Language Scale (PLS)

A. Auditory Comprehension

April 97 SS-69 Percentile 1 Age Equivalent 1.4

Sept. 98 SS-92 (invalid) Percentile 30 (invalid) Age
Equivalent 4-6 (Invalid)

Feb. 99 SS-54 Percentile 1 Age Equivalent 2-9

Oct. 99 SS-62 Percentile 1 Age Equivalent 3-1

B. Expressive Comprehension

April 97 SS-62 Percentile 1 Age Equivalent 1.4

Sept. 98 SS-50 Percentile 1 Age Equivalent 2-2

Feb. 99 SS-50 Percentile 1 Age Equivalent 2-4

Oct. 99 SS-50 Percentile 1 Age Equivalent 2-9

C. Total Language

April 97 SS-57 Percentile 1 Age Equivalent 1.5

Sept. 98 SS-68(invalid) Percentile 2 Age Equivalent 3-3(Invalid)

Feb. 99 SS-50 Percentile 1 Age Equivalent 2-7

Oct. 99 SS-51 Percentile 1 Age Equivalent 2-11

SK – HI – Language Delay Scales (designed for Hearing Impaired students)

April 97

A. Receptive 18-20 months

B. Expressive 18-20 months

GFW 4th Percentile

Sept. 98

- able to produce consonant sounds b, p, w, m, h, sh, y
- inconsistently produced f, th, s, h
- unable to produce b, d, t, l

* No documentation, no baseline, states could produce "b" couldn't produce "b"

TACL-R

Sept. 98

- SS-53 Age Equivalent 4.9 – 5.2 Percentile Rank 62? (105)
- These scores cannot be accurate. There is no way you would have a standard score of 53 and an accompanying percentile rank of 62.

Feb. 99

Administered again?

* Was the TACL-R administered again in Feb. 99? It was part of Annual

Evaluation Report no result

(SEM)

Gael – Pre-Sentence Level

Sept. 98

- Receptive 30/30 Common single words, 27/31 phrase sentences
- Expressive 23/30, objects 14/31, word combinations
- Comprehension 60 percentile, Prompted Production 25 percentile, Initiated Production 35 percentile

Feb. 99

- Was it administered again? Included as part of Annual Evaluation Report Feb. 99 no result

EOWPVT-R

Sept. 98 SS-59 Percentile 1 Age Equivalent 2.4

Feb. 99 SS-76 Percentile 5 Age Equivalent 3-3

Oct. 99 SS-77 Percentile 06 Age Equivalent 3-8

MacArthur Communication Development Inventory: Word & Gestures

April 97

- Appears to understand 122 words and say 59 words

Academics

April 97

- does name colors or shapes
- works best 1-1
- evidenced good growth all areas

* No documentation on baseline

Feb. 99

- MLU increased 4 to ? words

* No baseline or documentation

Attachment #2

ST. JOSEPH GOALS AND OBJECTIVES

Oct. 96

Audition Speech Language

5 initiated 5 initiated 5 initiated

Apr. 97

Audition Speech Language

2 met 5 progressing 5 progressing

3 progressing 1 new, progressing

1 new, progressing

*No documentation

Jun. 97 All new objectives – did not master
most from Oct. 96, yet added new objectives

Audition Speech Language

4 progressing 1 met 5 progressing

5 progressing

*No documentation

May 98 Did not master objectives of Jun. 97,
added all new objectives

Audition Speech Language

2 met 2 met 4 met

4 progressing 4 progressing 2 progressing

*No documentation 1 new, met

Jan. 99 All objectives are new

Audition Speech Language

10 not met 3 not met 6 not met

*No documentation

Apr. 99 All objectives are new

Audition Speech Language

10 not met 2 not met 6 not met

1 not targeted

Mastered 11 of 88 objectives (12 percent) from
Oct. 96 to Apr. 99

* did not master any of the objectives during the
1998-99 school year.

*St. Joseph did not have documentation of his
evaluation results for any of the objective

Attachment #3

**PROGRESS SUMMARY LONGITUDINAL
INFORMATION**

Jan. 1997 CA 3-0

- Significant auditory development prior to age
- Responding to environmental sounds
- Unable to detect Ling 6 sounds (ah, oo, ee, m, sh, ss) at close range, following training was able to detect Ling 6 sound 9 ft.
- Beginning to vocalize regularly
- Excellent transition from manual to oral

*No documentation

June 1997

- Made significant gains

*No documentation

Oct. 1997

- 's speech developing slowly
- Understands some directions-turn on light
- Able to repeat a 3 word phrase or sentence
- Follower
- Beginning to label colors, understands the value of a few numbers
- Repeats phrases of 1-3 words

*No documentation

May 1998 (Progress from Feb. – 1998)

- Gained 3 words receptively per thematic unit, 2 words expressively per thematic unit
- Understands common directions
- Imitates consonant sounds p, b, m, n, w initial and final sounds

*No documentation, no baseline

July 22-Aug. 1998

- Able to identify Ling 6 sounds from 9 ft.
- Uses 2-3 word utterances to comments, questions, and requests
- Produce final "P" 60%, final "m" 75%, final "t" 25%

*No documentation

Nov. 11, 1998

- Able to identify rhyming words and words varying in final sounds-What?
- Able to remember 3 commands, i.e., Draw a green circle
- Able to repeat a sentence with 5 words